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YELP INC. and FOODSPOTTING, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARC OPPERMAN, RACHELLE KING,
CLAIRE MOSES, GENTRY HOFFMAN,
STEVE DEAN, ALICIA MEDLOCK, ALAN
BEUESHASSEN, SCOTT MEDLOCK, GREG
VARNER, JUDY LONG, GUILI BIONDI,
JASON GREEN and NIRALI
MANDAYWALA, for themselves and all others
similarly situated,

Plaintiffs,

v.

PATH, INC., TWITTER, INC., APPLE, INC.,
FACEBOOK, INC., BELUGA, INC., YELP!
INC., BURBN, INC., INSTAGRAM, INC.,
FOURSQUARE LABS, INC., GOWALLA
INCORPORATED, FOODSPOTTING, INC.,
HIPSTER, INC., LINKEDIN CORPORATION,
ROVIO MOBILE OY, ZEPTOLAB UK
LIMITED AKA ZEPTOLAB, CHILLINGO
LTD., ELECTRONIC ARTS INC., and KIK
INTERACTIVE, INC.,

Defendants.

Case No. 4:13-cv-00453-JST

**DEFENDANTS YELP INC. AND
FOODSPOTTING, INC.'S NOTICE OF
MOTION AND MOTION TO DISMISS
PLAINTIFFS' SECOND CONSOLIDATED
AMENDED COMPLAINT**

Date: December 2, 2014
Time: 2:00 p.m.
Ct rm: 9, 19th Floor
Judge: Honorable Jon S. Tigar

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on December 2, 2014 at 2:00 p.m., or as soon thereafter as the Court may order, in Courtroom 9, 19th Floor of the U. S. District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Jon S. Tigar, Defendants Yelp Inc. (“Yelp”) and Foodspotting, Inc. (“Foodspotting”) by their attorneys Durie Tangri LLP, will move and hereby move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiffs’ Second Consolidated Amended Complaint.

This Motion is based upon this Notice of Motion and Memorandum, the Second Consolidated Amended Complaint, and other pleadings on file in this matter, the arguments of counsel, and such other and further matter as the Court may consider.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

It is now time to stop dealing with “Defendants” *en masse*, and address the remaining claims—or lack of them—against each party individually. In previous iterations of this lawsuit, the sheer number of claims and parties rendered such individualized analysis impractical: the last version of the complaint attempted to state twenty-six separate claims against fifteen different defendants. The claims against the App Developers (*i.e.*, everyone but Apple) were in the main stated generically against “Defendants,” notwithstanding that the factual averments concerning each App Defendant varied widely. Lest the Court be burdened with over a dozen motions, each attacking more than a score of claims, the Defendants filed consolidated motions where possible, addressing the defects of each claim that were for the most part common to all Defendants.

The Court’s latest dismissal order, however, has pared this case to manageable proportions. As to the App Defendants, there remain only two claims: a claim for intrusion upon seclusion, and a recycled version of a previously-dismissed claim for conversion. These claims fail as to all App Defendants, for several reasons. But for several of the App Defendants, including Yelp and Foodspotting,¹ those claims are particularly defective, because the Second Consolidated Amended Complaint (ECF No. 478) (“SCAC”) expressly pleads that both Yelp and Foodspotting obtained permission to access their users’ Contacts in order to perform the function those users wanted: To be notified of and connected to any of their friends who were using the same App.

Specifically, as to Yelp, in Plaintiffs’ own words:

120. Plaintiffs Biondi, Hodgins, Hoffman, Mandaywala, and Paul (the “Yelp Plaintiffs”) each recall navigating to various screens on and using the Yelp! App. They recall providing a log in and navigating within the Yelp! App to a screen containing a [“Find Friends”] button with the accompanying displayed text: “Find friends on Yelp using your Contacts and Facebook friends? You’ll be able to see their bookmarks and find out when they’re nearby. [Yes, Find Friends] [No, Skip This]”, and pressing the [“Yes, Find Friends”] button. Plaintiffs do not recall being presented at any time in that process with an intervening alert or pop-up display indicating that the Yelp! App would transfer any portion of his or her

¹ Yelp and Foodspotting have no corporate or operational relationship: they join in this motion because they are similarly situated, in an attempt to reduce by one the number of motions the Court must consider.

1 private address book to Yelp to perform this function or warning that such
2 a transmission was about to occur.

3 And for Foodspotting:

4 128. Plaintiffs King and Sandiford (the “Foodspotting Plaintiffs”) recall
5 opening the Foodspotting App, signing up via its registration screen, and
6 using the App. More particularly, they recall navigating to the
7 Foodspotting App’s “Follow People” screen containing an on-screen
8 button labeled [“Find iPhone Contacts.”]. While on that screen, the
9 Foodspotting Plaintiffs tapped that button. The screen contained no
10 warnings whatsoever indicating that the App was relaying his or her
11 address book to Foodspotting.

12 SCAC ¶¶ 120, 128.

13 Thus for both Yelp and Foodspotting, there is no factual dispute. In each case, the alleged
14 “intrusion upon seclusion”—the ability of an automated process to “access” the address book in the
15 users’ Contacts file—was expressly disclosed and agreed to. There are no allegations that either Yelp or
16 Foodspotting did anything else: no allegation that they disclosed any contact information to third parties,
17 or sold that information, or used that information for advertising purposes, or kept that information any
18 longer than necessary, or did *anything* other than match each Plaintiff’s contacts against their user base.²

19 The SCAC, as did its predecessor, attempts to finesse this express consent by drawing a purported
20 distinction between “using,” “finding,” or “accessing” one’s Contacts on the one hand, and
21 “transmitting” or “copying” them to Yelp’s or Foodspotting’s servers on the other. But putting aside the
22 dubious proposition (discussed below) that there is anything “highly offensive” in an automated process
23 seeing—with permission—the email addresses in one’s Contacts to begin with, the SCAC repeats the
24 fallacy that there is some difference between “accessing” the contact information on one’s phone for the
25 express purpose of comparing it to the information of other users, and “transmitting” it to a server in
26 order to perform that function. They are one and the same: a computer server cannot “access” or “use”
27 data on a phone without moving (or “transmitting”) that data to the server where it can be matched with a
28 database of other users.³

² Nor could Plaintiffs make such allegations, because they are false.

³ Of course in theory the process could work in reverse, with Yelp *seriatim* sending every one of its millions of user addresses to the user’s phone for comparison, but that process would quickly overwhelm any mobile device, and require orders of magnitude more bandwidth and battery usage even if possible.

1 The fact that users may not *understand* the inevitable mechanics of a “friend finder” function
2 does not mean that either Yelp or Foodspotting are accused of doing anything other than precisely what
3 their users asked them to do. Imagine, for example, that I call a local restaurant and ask to reserve a table
4 for four this evening.

5 When I arrive at the restaurant, I proceed to the hostess stand, where I announce myself. In
6 response, the hostess says “just one moment,” and I observe her bringing up a list of reservations on a
7 computer terminal, including my name, phone number, time, and number of guests. Imagine further that
8 my reaction is “wait a minute! I just asked for a reservation. I didn’t ask you to put my name and
9 number in your computer system, or show it to the hostess.” No one would see a tort in the routine
10 process that is part and parcel of the very function I requested. The idea that my rights have been
11 infringed simply because I don’t understand the minutiae of that process is untenable.

12 So too here: Plaintiffs’ feigned confusion between “accessing” and “transmitting” their data
13 cannot create a cause of action where none exists. That imagined distinction was barely enough to
14 squeak past the prior motion to dismiss, when mixed in with allegations aimed at other App Developers
15 accused of both accessing and transmitting Contacts with no prior disclosure or permission whatsoever.
16 But the SCAC is different in crucial ways that require dismissal of the claims against Yelp and
17 Foodspotting.

18 *First*, the intrusion on seclusion claim now stands alone (other than the already-dismissed
19 conversion claim, which as discussed below fails from the same lack of Article III standing and other
20 reasons as before). Gone are the prior statutory claims of improper acquisition under the Wiretap Act,
21 disclosure to third parties under the Stored Communications Act, common law disclosure of private facts,
22 California and Texas computer crime statutes, and the like. All that is left is a claim that the App
23 Defendants intruded on the Plaintiffs’ “seclusion” by gaining access to private, personal information in
24 their Contact files. But that tort, if it occurred at all, was completed at the time the Yelp or Foodspotting
25 App first gained access to that data, and that is *precisely* what each Plaintiff concedes what was
26 consented to. Even if one accepts the false premise that transmitting that data to the developers’ servers
27 is somehow a different and additional act, it adds no new claim: the alleged intrusion has already
28

1 occurred, and—as this Court has already held—there are no allegations beyond that initial intrusion that
2 give rise to any additional claim that survives Article III scrutiny.

3 And *second*, even if one were to accept the proposition that transmitting copies of Plaintiffs’
4 contacts to Yelp’s and Foodspotting’s servers in order to perform the requested service is somehow an
5 act independent and apart from “accessing” that data, any claim based on that “separate” act is preempted
6 by the Copyright Act: it is purely and simply a claim that—having already obtained permission to access
7 the data—Yelp and Foodspotting then made a copy of it. Such copying is actionable, if at all, only under
8 the Copyright Act, which preempts equivalent state law claims.

9 Plaintiffs’ conversion claim also fails, for multiple reasons: it also is preempted by the Copyright
10 Act, it fails Article III scrutiny, and it fails on the merits, both because it does not involve any property
11 right at all and because the Plaintiffs were never deprived of anything in which they held a property
12 interest.

13 **II. ARGUMENT**

14 **A. Renewal of Defendants’ Rule 12 Challenge to The Intrusion Upon Seclusion Claim is** 15 **Proper**

16 As a threshold matter, we recognize that this Court has already addressed the collective App
17 Developers’ arguments concerning Plaintiffs’ claim of intrusion upon seclusion. Renewing that
18 challenge, however, is entirely proper. To begin with, as noted above, the SCAC is quite narrower: gone
19 are all of the claims of post-access torts (both statutory and common law) that could convert access with
20 consent to actionable acquisition or disclosure of personal facts. Similarly, where the nature of the prior
21 omnibus complaint and motions required abbreviated consideration of allegations directed to
22 “Defendants” as an undifferentiated mass, we now address only two claims, as against two defendants.
23 And finally, it is established law that the filing of a new complaint “wipes the slate clean” and permits a
24 renewed Rule 12 challenge to the entire complaint, including causes of action carried over from the prior
25 complaint:

26 “[A]n amended complaint supersedes the original complaint and renders it
27 without legal effect,” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th
28 Cir.2012) (en banc), such that a defendant may challenge an amended
complaint in its entirety, *see Sidebotham v. Robison*, 216 F.2d 816, 823 (9th
Cir.1954) (“[O]n filing a third amended complaint which carried over the
causes of action of the second amended complaint, the appellees were free

1 to challenge the entire new complaint.”); *see also In re Sony Grand Wega*
 2 *KDF–E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F.
 3 Supp. 2d 1077, 1098 (S.D. Cal. 2010) (holding that defendant was free to
 move for dismissal of entire amended complaint, including claim that had
 already withstood a previous motion to dismiss).

4 *Bruton v. Gerber Prods. Co.*, No. 12-cv-02412-LHK, 2014 WL 172111, at *7 n.2 (N.D. Cal. Jan. 15,
 5 2014).

6 **B. Plaintiffs Do not State a Claim for Intrusion**

7 **1. Legal Standard**

8 Like the common law tort of public disclosure of private facts, California and Texas apply the
 9 Restatement, Second, of Torts’ elements for common law intrusion. To state a claim for intrusion under
 10 California law, a plaintiff must allege: (1) intrusion into a private place, conversation or matter, (2) in a
 11 manner highly offensive to a reasonable person, and (3) resulting harm to the plaintiff. *Shulman v.*
 12 *Group W Prods., Inc.*, 18 Cal. 4th 200, 231 (1998) (citing Restatement (Second) of Torts § 652B).
 13 Similarly, under Texas law, a claim for intrusion on seclusion exists when (i) the defendant intentionally
 14 intruded on the plaintiff’s solitude, seclusion, or private affairs; and (ii) the intrusion would be highly
 15 offensive to a reasonable person. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993). To satisfy
 16 the first element, Plaintiffs must allege and ultimately prove that each of them had “an objectively
 17 reasonable expectation of seclusion or solitude in the place, conversation or data source, and the
 18 defendant must have penetrated some zone of physical or sensory privacy surrounding, or obtained
 19 unwanted access to data about, the plaintiff.” *Lorenzo v. United States*, 719 F. Supp. 2d 1208, 1215 (S.D.
 20 Cal. 2010) (internal quotations omitted) (citing *Shulman*, 18 Cal. 4th at 232). To satisfy the second
 21 element, California courts require that plaintiffs “also allege that the *use* of the information was highly
 22 offensive.” *Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 993 (2011) (allegations that
 23 defendant deceptively collected plaintiffs’ home addresses for marketing purposes was not “highly
 24 offensive” behavior).

25 **2. Plaintiffs’ Consent Bars Any Claim of Intrusion Against Yelp and** 26 **Foodspotting**

27 In the cases of Yelp and Foodspotting, Plaintiffs cannot satisfy the requirement that they had an
 28 “objectively reasonable expectation” that either Yelp or Foodspotting would “obtain[] unwanted access

1 to data,” (*Lorenzo*, 719 F. Supp. 2d at 1215) for the obvious reason that the SCAC expressly pleads that
2 both companies obtained consent to precisely that access for the express purpose the user sought. The
3 SCAC does not allege Defendants used Plaintiffs’ mobile device contacts for any further purpose *at all*,
4 much less a “highly offensive” purpose. At most, the SCAC alleges Defendants used the addresses to
5 enhance the social features of their services to inform Plaintiffs which of their contacts were already
6 users of Defendants’ respective services. Defendants operate online services with social components,
7 and identifying social connections to users was far from a “highly offensive” practice. Indeed, even if
8 Defendants were alleged to use the contacts for advertising or marketing purposes—and again, there are
9 *no* allegations of the sort against Yelp or Foodspotting—*Folgelstrom* and numerous other cases make
10 clear that such commercial uses of address information are not “highly offensive.” In *Folgelstrom*,
11 Plaintiffs alleged a retailer had requested consumers’ zip codes at checkout for the purpose of obtaining
12 their home addresses for marketing and advertising purposes. Plaintiffs alleged the retailer had acted
13 deceptively by not disclosing how they would use the consumers’ zip codes. *Folgelstrom*, 195 Cal. App.
14 4th at 992. The court affirmed dismissal of the case on its pleadings, finding that this was not “highly
15 offensive” but was instead “routine commercial behavior.” *Id.*; *see also In re iPhone Application Litig.*,
16 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) (disclosure of data, such as address, phone number, name,
17 age, and gender, did not constitute an “egregious breach of social norms” under California law); *In re*
18 *Google Inc. Privacy Policy Litig.*, No. 5:12-cv-01382-PSG, 2014 WL 3707508, at *12 (N.D. Cal. July
19 21, 2014) (“This district ‘set[s] a high bar’ for the requisite ‘intrusion [that is] highly offensive to a
20 reasonable person.’”⁴; *Puerto v. Super. Ct.*, 158 Cal. App. 4th 1242, 1253-54 (2008) (noting that contact
21 information is not “particularly sensitive” and is not the type of information deemed “private”); *Hill v.*
22 *NCAA*, 7 Cal. 4th 1, 26 (1994) (“[P]laintiff in an invasion of privacy case must have conducted himself or
23 herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have
24 manifested by his or her conduct a voluntary consent to the invasive actions of defendant.”).

25
26 ⁴ Quoting *Belluomini v. Citigroup Inc.*, No. 3:13-cv-01743, 2013 WL 5645168, at *3 (N.D. Cal. Oct. 16,
27 2013); *see also Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121, 1127–28 (N.D. Cal. 2008) (dismissing invasion
28 of privacy claim where Plaintiff’s stolen laptop contained personal information including social security
number).

1 Similarly, in *Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2014 WL 2751053 (N.D. Cal.
 2 June 12, 2014), the court addressed strikingly similar claims as here, and found that the user’s consent to
 3 finding “connections” vis “Google Contacts” was fatal to his privacy claims. LinkedIn’s use of those
 4 Google Contacts to send invitations on behalf of plaintiff was not actionable, because plaintiff had
 5 consented to such use. *Id.*

6 Plaintiffs expressly allowed—indeed requested—Yelp and Foodspotting to access their Contact
 7 lists to perform the precise function they desired: to connect with their friends through the Apps to
 8 improve the Apps’ social networking experiences. As the long line of caselaw discussed above makes
 9 clear, such conduct does not rise to the level of intrusion even if done against the plaintiff’s will or
 10 without the plaintiff’s knowledge. When done at the user’s request, it cannot possibly support a claim of
 11 intrusion upon seclusion.

12 3. Intrusion Based on Copying of Contact Information Is Preempted

13 As set forth above, Plaintiffs cannot state a cause of action based on Yelp’s or Foodspotting’s
 14 access to their Contacts, both because they consented to that access and because such access, even if
 15 nonconsensual, fails to come near the “high bar” for an intrusion claim. In hopes of avoiding that result,
 16 the SCAC, as its predecessor did, seeks to piggyback what it portrays as a second, independent basis for
 17 liability. The argument, as before, goes as follows: “perhaps we gave you permission to *access* our
 18 contacts, but we didn’t give you permission to *copy* them, and that copying exceeds the consent we
 19 gave.”⁵

20 But even assuming *arguendo* that access and copying are not in fact the same thing here, the
 21 copying of the Plaintiffs’ contact information becomes the *only* act alleged against either Yelp or
 22 Foodspotting for which Plaintiffs did not admittedly give their consent. And thus the claim runs head-on
 23 into Copyright Act preemption. As the court in *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1189
 24

25 ⁵ In declining to dismiss this cause of action in the last round of briefing, this Court relied on Plaintiffs’
 26 allegation “that they would not have consented had they known that their apps would not only scan their
 27 address books to determine whether their friends were using the same app, **but then upload the address**
 28 **books to the app developer for other purposes.**” Order Granting in Part and Denying in Part
 Defendants’ Motion to Dismiss (ECF No. 67) (“Order”) at 44 (emphasis added). But in the SCAC, as
 regards Yelp and Foodspotting, **no other such other purposes or uses are alleged.**

1 (C.D. Cal. 2001), *dismissed in part on other grounds*, 90 Fed. App'x 496 (9th Cir. 2003), explained,
2 “[t]he Ninth Circuit employs a two-part test to determine whether the Copyright Act preempts particular
3 state law claims. Preemption occurs when: (1) the work at issue comes within the subject matter of
4 copyright (i.e., a “work” “expressed in words, numbers, or other verbal or numerical symbols or indicia,
5 regardless of the nature of the physical objects . . . in which they are embodied,” 17 U.S.C. § 101; and (2)
6 the rights at issue under state law are equivalent to those protected by the Act. *See Kodadek v. MTV*
7 *Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1998); *Valente-Kritzer Video v. Pinckney*, 881 F.2d 772,
8 776 (9th Cir. 1989); *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 976 (9th Cir.
9 1987); 17 U.S.C. § 301(a).”

10 The first prong of this test is satisfied wherever the works at issue—in this instance, “literary
11 works”—come within the “subject matter of copyright,” as defined by 17 U.S.C. § 102, even where the
12 works at issue (or some parts of those works) may not actually be protected, or even protectable, under
13 the Copyright Act. *See, e.g., Entous v. Viacom Int’l Inc.*, 58 U.S.P.Q.2d 1628, 1634 (C.D. Cal. 2001);
14 *Selby v. New Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1058-59 (C.D. Cal. 2000); *Firoozye v. Earthlink*
15 *Network*, 153 F. Supp. 2d 1115, 1124-25 (N.D. Cal. 2001). In other words, the scope of preemption is
16 broader than the scope of protection, or put another way, “the shadow actually cast by the Act’s
17 preemption is notably broader than the wing of its protection.” *Endemol Entm’t B.V. v. Twentieth*
18 *Television Inc.*, 48 U.S.P.Q.2d 1524, 1526 (C.D. Cal. 1998) (quoting *U.S. ex rel. Berge v. Trustees of the*
19 *Univ. of Alabama*, 104 F.3d 1453, 1463 (4th Cir. 1997)). The work(s) upon which a state law claim is
20 based need only be within the “subject matter” of copyright; their actual *protection* thereunder is
21 irrelevant to a preemption analysis. *See, e.g., Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212-13
22 (9th Cir. 1998) (uncopyrighted drawings).⁶

23 The second prong is satisfied wherever the rights asserted in the state law cause of action are
24 “equivalent” to those protected by the Copyright Act. In order to avoid preemption, “the state cause of
25

26 ⁶ To be clear, as discussed below, a collection of email addresses does not qualify for copyright
27 protection, but that does not alter the preemption analysis: the act of copying falls within the subject
28 matter of copyright, and is preempted regardless whether the allegedly copied material satisfies the
Copyright Act’s originality requirements or—as here—is in the public domain for failure to do so.

1 action must protect rights which are qualitatively different from the copyright rights.” *Del Madera*
 2 *Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir.1987), *overruled on other grounds by*
 3 *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). “The state claim must have an ‘extra element’ which
 4 changes the nature of the action.” *Id.* (citation omitted). A court should not rely merely on a “laundry
 5 list” of the alleged “elements” of the state law claims at issue, such that the mere *possibility* of an “extra
 6 element” protects a claim from preemption. Instead, the court should engage in a fact-specific inquiry
 7 into the *actual* allegations underlying the claims at issue in the case, so as to determine whether the
 8 “gravamen” of the state law claim asserted is the same as the rights protected by the Copyright Act. *See*
 9 *Entous*, 58 U.S.P.Q.2d at 1634-35; *Selby*, 96 F.Supp.2d at 1059-60; *Kodadek*, 152 F.3d at 1212
 10 (implicitly adopting this approach); *Dielsi v. Falk*, 916 F. Supp. 985, 990-93 (C.D. Cal. 1996). In other
 11 words, the question is whether the state law claims *as they are asserted* are “equivalent” to a federal
 12 copyright claim.

13 Here, that analysis is straightforward. Even if Plaintiffs’ Contacts lists were copyrightable (and
 14 as set forth below, they are not), the only unauthorized act Plaintiffs’ allege beyond the scope of their
 15 admitted consent is the bare copying of those lists to Yelp’s and Foodspotting’s servers. There are no
 16 additional allegations of improper disclosure (inadvertent or deliberate) to third parties, or sale of lists, or
 17 marketing use, or anything beyond bare copying. There is, in short, no “additional element”: the
 18 gravamen of Plaintiffs’ claim is that Yelp and Foodspotting copied their data, period. That claim is
 19 squarely preempted by the Copyright Act.

20 C. The SCAC Fails to State a Claim for Conversion

21 Plaintiffs base their common law conversion claim on allegations that “Defendants” used
 22 Plaintiffs’ intangible contacts. SCAC ¶¶ 256-64. Because Plaintiffs fail to allege either ownership or
 23 dispossession of any property (real or intellectual), because the conversion claim is squarely preempted,
 24 and because no Article III harm underlies their claim, the SCAC does not state a claim for conversion
 25 and should be dismissed.

26 1. Plaintiffs lack Article III Standing for their Conversion Claim

27 This Court has already dismissed this claim once on Article III grounds, finding that “the copying
 28 of such information without any meaningful economic injury to consumers is insufficient to establish

1 standing on that basis.” Order at 40 (“[I]n cases where the alleged converter has only a copy of the
2 owner’s property and the owner still possesses the property itself, the owner is in no way being deprived
3 of the use of his property. The only rub is that someone else is using it as well.”) (citing *FMC Corp. v.*
4 *Capital Cities/ABC, Inc.*, 915 F.2d 300, 303-04 (7th Cir. 1990)). As this Court noted, Plaintiffs’ prior
5 complaint alleged no diminution in the value of their contact information, and thus lacked Article III
6 standing. Order at 39 (“Put another way, a plaintiff must do more than point to the dollars in a
7 defendant’s pocket; he must sufficiently allege that in the process he lost dollars of his own.”) (quoting *In*
8 *re Google Inc. Privacy Policy Litig.*, No. 5:12-cv-01382-PSG, 2013 WL 6248499, at *5 (N.D. Cal. Dec.
9 3, 2013)).

10 Nothing has changed in this version. Plaintiffs’ claims still lack any allegation of economic
11 injury flowing from the alleged conversion, and thus the result must be the same. There is no Article III
12 standing for this claim.

13 2. No Property is at Issue Here

14 Conversion is a property tort: before there can be conversion, one must first establish ownership
15 of whatever has been taken: “[1] First, there must be an interest capable of precise definition; [2] second,
16 it must be capable of exclusive possession or control; and [3] third, the putative owner must have
17 established a legitimate claim to exclusivity.” *Kremen v. Cohen*, 337 F.3d 1024, 1030–31 (9th Cir. 2003)
18 (internal quotations omitted) (citation omitted). Plaintiffs’ conversion claim jumps right over ownership,
19 but upon examination they allege no deprivation of any *property* at all, either real, personal, or
20 intellectual.

21 Plaintiffs unquestionably own their phones and tablets: they are personal property. But there is
22 no claim that either Yelp or Foodspotting (or anyone else) has deprived any plaintiff of either ownership
23 or use of their devices, even for a moment. There is also no dispute that Plaintiffs own their *copies* of the
24 information in their address books, just as they own their paper phone books, and the takeout menus in
25 their kitchen drawers, and the books on their shelves. But again, there is no allegation that they have
26 been deprived of possession or use of their Contact lists, even for a moment: they are still right where
27 they always were, and just as useful.

1 What Plaintiffs allege is only that Yelp and Foodspotting have made *copies* of those lists, without
2 depriving Plaintiffs of any dominion over the originals or the devices in which they reside. But (over and
3 above the obvious preemption issue, discussed below) this claim does not implicate any property right of
4 Plaintiffs, and absent a property right, there can be no conversion. If there is any property right in the
5 intangible set of email addresses on one's iPhone that grants the phone's owner exclusive dominion over
6 that list of character strings, it can only be intellectual property. But U.S. law has a carefully defined set
7 of rules defining when one can "own" each category of intellectual property, and Plaintiffs' address lists
8 meet none of those rules.

9 Lists of email addresses are certainly not patentable, and Plaintiffs make no claim theirs are.
10 Neither are Plaintiffs' Contacts subject to trade secret protection. Some address lists could be, if they
11 were used in commerce, kept secret, and derived competitive economic value from not being known to
12 competitors.⁷ Customer contact lists are the paradigmatic example. But again, no Plaintiff makes such a
13 claim here. And a list of addresses or phone numbers is the classic example of what is *not* copyrightable:
14 no matter how much "sweat of the brow" one puts into compiling the list, it is a list of facts, and not
15 subject to copyright protection. *Feist Publ'ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340 (1991)
16 (telephone directories not copyrightable).

17 Simply put, Plaintiffs may have a privacy interest in their Contacts, but as set forth above, that
18 privacy interest is not infringed here. What they do *not* have is a property interest in the information
19 contained in those lists, or any right to prevent others, once they have been allowed access to those lists,
20 from copying them. By analogy, you cannot break into my house and steal my box of recipes. But if I
21 invite you to dinner, and then freely show you my carefully perfected recipe for that dinner, nothing in
22 the law prevents you from copying it down, on the spot or from memory: I have no property right that
23 bars you from doing so.

24
25 ⁷ See, e.g., *DVD Copy Control v. Bunner*, 31 Cal. 4th 864, 874 (2003) (trade secret consists of
26 "information, including a formula, pattern, compilation, program, device, method, technique, or process,
27 that: (1) Derives independent economic value, actual or potential, from not being generally known to the
28 public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the
subject of efforts that are reasonable under the circumstances to maintain its secrecy.") (internal
quotations omitted) (citation omitted).

3. The SCAC Fails to State a Conversion Claim

The Ninth Circuit has recognized that intangible property is subject to the tort of conversion only where the defendant has deprived the plaintiff of possession or use of that intangible property. *Kremen*, 337 F.3d at 1030–31 (Internet domain name “sex.com” was capable of exclusive possession or control); *see also Cardonet, Inc. v. IBM Corp.*, No. C-06-06637 RMW, 2008 WL 941707, at *1 (N.D. Cal. Apr. 7, 2008) (tort of conversion “requires the wrongful exercise of dominion over another’s property.... [and] [t]his requires some deprivation of ownership”) (internal quotations omitted) (citation omitted). Similarly, Texas law requires that the defendant “wrongfully exercised dominion or control” of plaintiff’s property “to the exclusion of and inconsistent with the plaintiff’s rights” to state a claim for conversion. *Omnibus Int’l, Inc. v. AT&T, Inc.*, 111 S.W.3d 818, 826 (Tex. Ct. App. 2003). In fact, Texas does not recognize a cause of action for conversion of *any* form of intangible property regardless of whether it is capable of exclusive possession. *See Carson v. Dynege*, 344 F.3d 446, 456 (5th Cir. 2003) (noting that conversion allegations regarding intellectual property rights, are “outside the scope of Texas conversion law, which concerns only physical property); *Devon Energy Corp. v. Westacott*, No. C 10–0075 RS (PR), 2011 WL 1157335, *10 (S.D. Tex. March 24, 2011) (acknowledging that Texas courts have not yet recognized intangible property as the proper subject of a conversion claim, despite decisions by other state courts to do so). Accordingly, the tort of conversion does not apply to intangible property like Plaintiff’s contacts that multiple people can copy and use at the same time.

In *Hernandez*, Judge Gonzalez-Rogers dismissed a conversion claim against Path premised on the same factual allegations here. *Hernandez v. Path, Inc.*, No. 12-CV-01515 YGR, 2012 WL 5194120, at *7 (N.D. Cal. Oct. 19, 2012). Plaintiffs have alleged nothing new that compels a different result here. Plaintiffs have not and cannot allege that Defendants have dispossessed or excluded Plaintiffs from use of the contacts on their respective devices. Rather, Plaintiffs have alleged only that Defendants *copied* this information and transmitted it to others. Plaintiffs claim this harmed them because “Defendants” “*in some cases* disseminate their personal and private address books,” (SCAC ¶ 2), but notably make no allegation that either Yelp or Foodspotting has done anything of the sort. But even were it made, this allegation does not amount to conversion. “In cases where the alleged converter only has a copy of the owner’s property and the owner still possesses the property itself, the owner is in no way being deprived

of the use of his property.” *FMC Corp.*, 915 F.2d at 303–04 (“[T]he receipt of copies of documents, rather than the documents themselves, should not ordinarily give rise to a claim for conversion.”) (internal quotation omitted). Unlike the domain name at issue in *Kremen*—a unique Internet address that could not be replicated—the contact information on Plaintiffs’ devices can exist on multiple devices, and multiple people can access and use it without excluding any single person from using it.

4. Plaintiffs’ Conversion Claim is Preempted

Finally, even if Plaintiffs’ conversion claim could overcome all of the defects that led to its dismissal the last time around, it is obviously preempted. The alleged conversion at issue is nothing more than a claim that Yelp and Foodspotting copied Plaintiffs’ Contacts to their servers. As the gravamen of that claim is precisely coextensive with a claim under the Copyright Act (albeit a failed claim, as the work at issue is not copyrightable, it is preempted. *See* Section B(3), *supra*.

Indeed, state law conversion claims are paradigmatic copyright preemption cases. As Judge Breyer explained in *Firoozye*:

[W]hile a claim for conversion typically involves tangible property and thus may be immune from preemption, **where a plaintiff is only seeking damages from a defendant’s reproduction of a work—and not the actual return of a physical piece of property—the claim is preempted.** Because claims involving the conversion or misappropriation of works within the subject matter of copyright typically seek damages for the unauthorized reproduction of the works and not just the unauthorized possession or use of a specific piece of property, “legions of cases ... have held pre-empted claims for misappropriation ...” 1 Nimmer on Copyright § 1.01[B][1][f], at 1–35; *see id.* § 1.01[B][1][h], at 1–40 (noting that where a state law does not require secrecy for a misappropriation claim, there is no additional element precluding preemption).

Here, the plaintiff is not seeking the return of a tangible piece of property. Indeed, the plaintiff sent WebStash to the defendants and authorized them to use it for their own evaluation, so he cannot claim that the defendants wrongfully obtained possession over that specific version of the program. Instead, the plaintiff is alleging that the defendants wrongfully reproduced WebStash without his permission, the essence of a claim for copyright infringement. Accordingly, the plaintiff’s claim for conversion is preempted

153 F. Supp. 2d at 1130 (emphasis added; citations omitted); *see also Design Art v. Nat’l Football League Props, Inc.*, No. 00CV593 JM (JAH), 2000 WL 33151646, at *3 (S.D. Cal. Aug. 18, 2000) (finding a conversion claim preempted because the plaintiffs were essentially alleging that the defendants “interfered with plaintiffs’ exclusive rights as the owner of the copyrights to the subject work”).

1 So too here. There is no claim that Plaintiffs have been dispossessed of, or denied the use of,
 2 either their personal property or their contact information. Plaintiffs' conversion claim is nothing more
 3 than a claim that Yelp and Foodspotting made copies of that information, and such claims are squarely
 4 preempted.

5 **III. CONCLUSION**

6 This case has meandered through two courts, and many complaints, for two and a half years.
 7 From the beginning, it has been an amorphous mess, throwing generic complaints numbering in the
 8 hundreds of pages against any defendant in sight, regardless whether those defendants had anything in
 9 common beyond the bare fact that they all were involved in some way in offering "social" Apps, which
 10 by design are intended to link users together with their friends. At no point in any of the thousands of
 11 pages of pleadings has there ever been any allegation that *any* of the Apps at issue did anything other
 12 than that.

13 At best, Plaintiffs have alleged that *some* of the Apps did just what the users wanted, but failed to
 14 ask permission first. But for Yelp, Foodspotting, and several other Defendants, Plaintiffs cannot make
 15 even that claim: they expressly plead that both Yelp and Foodspotting obtained their users' consent
 16 before accessing their Contacts in order to "find friends." The analysis should end there.

17 Plaintiffs have now had multiple chances, without success, to craft a tort from Apps that
 18 performed exactly as they were supposed to. Enough is enough. The two remaining claims against Yelp
 19 and Foodspotting should be dismissed, this time with prejudice.

20
 21 Dated: August 22, 2014

DURIE TANGRI LLP

22
 23 By: /s/ Michael H. Page
 MICHAEL H. PAGE

24 Attorneys for Defendants
 25 YELP INC. and FOODSPOTTING, INC.
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 27
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CERTIFICATE OF SERVICE

I certify that all counsel of record who has consented to electronic notification is being served on August 22, 2014 with a copy of this document via the Court's CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to all non-CM/ECF participants.

/s/ Michael H. Page
Michael H. Page

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